THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA.

THE claim of unlimited power in the treaty-making power of the United States has of recent years been constantly made by distinguished authors in volumes devoted to that subject as well as through elaborate magazine articles which have appeared from time to time. This claim is based upon Article VI of the Constitution of the United States, which is as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of the State to the contrary notwithstanding."

When the Southern States seceded from the Union they adopted a Constitution in March, 1861, to control their action. The conflict which brought about the secession of the Southern States was caused by the claim of the supremacy of the federal government over certain rights popularly known as the rights of the States.

This struggle has been with us from the beginning. The divergence of views of the two schools of thought was clear and emphatic. The cleavage was unmistakable.

The preservation of the rights of the States against the aggression of federal power had from the beginning of our constitutional history been one of the subjects which had divided the people of the country. The Civil War was the result of the determination on the part of the seceding States to secure and limit this principle. And while undoubtedly in the Southern States this principle was firmly accepted by a majority of the people as the fundamental doctrine of their political faith, historical evidence is not lacking of the strength of this principle throughout the whole country especially in New England and

the Middle States during the time of the formation of the Constitution and since that day. Indeed it can scarcely be denied that this principle denounced as heretical in later years had obtained a strong lodgment in the minds of the people of New England and the East and many of its most valiant champions can be claimed from those sections of the country; and while the results of the war have undoubtedly imposed limitations on the powers of the States and given additional powers to the federal government growing out of the post bellum amendments, yet the character of the government has remained unchanged. Justice Miller in the Slaughter-House Cases[1] recognizes this in the following language:

> "But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights—the rights of person and property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States and to confer additional power on the Nation."

If then the act of the Southern States in seceding from the Union in 1861 was for the purpose of maintaining the doctrine of the rights of the States, as contained in the reserved powers in the Tenth Amendment of the Constitution, it seems clear that the Confederate States founded upon the assertions of this principle and for which they were even willing to resist, with arms, the national government, would be careful that the Constitution which they were to adopt should contain no provision admitting of any doubt as between national and State powers to the detriment of the latter.

An examination of the Constitution of the Confederate States will therefore, be of interest in seeing how far they eliminated

[1] 16 Wall. (U. S.) 82.

all questions which had divided the people of the country from the beginning of the government on this great question.

To the student of our constitutional history the construction which Judge Story and his disciples have given to those celebrated words in the Preamble of the federal Constitution: "We, the people of the United States, in order to form a more perfect union, etc." is familiar. By Judge Story the character of our government was claimed to hinge upon these words; that they bespoke the union of the people in one body-politic; while Mr. Calhoun and his followers denied such claims asserting that they meant the people of the several States, as separate and distinct bodies-politics who constituted the United States.

The South was strongly opposed to Judge Story's views on this subject and, therefore, when the seceding States came to frame the Constitution for the Confederate States, instead of the language which we have in the Preamble to the Constitution of the United States, above quoted, we find the following: "We, the people of the *Confederate States, each State acting in its sovereign and independent character,* in order to frame a more permanent federal government, do ordain and establish this Constitution for the Confederate States of America." The change in this preamble shows the determination of the Confederate States to eliminate the claim which Judge Story had advanced and the assertion of the principle that the government to be formed by that Constitution was to be for the people of the Confederate States, not united in one body-politic, but as distinct bodies-politic as represented in the several States.

Another great subject of controversy between the North and the South that had been contested from the beginning of the government was the tariff question, authorized in Article 1, § 8, Clause 1, of the Constitution of the United States. The North being engaged already in manufactures, the South in agriculture, the question was often raised by the representatives of the South that under this article of the Constitution there existed no power to lay any tariff duty on articles for any other purpose than for raising revenue for the government. On the other hand the North contended that under this power the manufactures of the United States could be protected from

the invasion of foreign goods and that such a duty could be laid by Congress on foreign goods beyond the revenue point so as to secure such privileges to the domestic manufacturer. The country North and South were as distinctly divided on this question as they had been on the former one. It is of interest, therefore, to note in the language of their Constitution how this question was settled by the Confederate States. Article 1, § 8, Clause 1, of the Constitution of the United States is as follows: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States, etc." Article 1, § 8, Clause 1, of the Constitution of the Confederate States is as follows: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, *for revenue necessary* to pay the debts, provide for the common defense, *and carry on the government of the Confederate States: but no bounty shall be granted from the Treasury, nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry, etc.*" This language of the Constitution of the Confederate States shows that the determination to eliminate the controversy that had existed from the beginning of the government on the tariff question had been settled forever in the permanent establishment of the view that had prevailed by a large majority of the people of the South as to the constitutional right to impose tariff duties.

Another question which had divided the country was the right and power of Congress to appropriate money for internal improvements. The South generally took the opposite view from the statesmen of the North in holding that no such power existed. In this same Article 1, § 8, Clause 2, the Constitution of the United States declares that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." Article 1, § 8, Clause 2, of the Confederate Constitution, in order to eliminate the question upon which the sections had been divided makes this provision: "The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian

tribes; *but neither this, nor any clause contained in the Constitution shall ever be construed to delegate the power to Congress to appropriate money for any internal improvements intended to facilitate commerce; except for the purpose of furnishing lights, beacons, buoys, and other aid to navigation upon the coast, and the improvement of harbors and the removing of obstructions in river navigation facilitated thereby, as may be necessary to pay the cost and expense thereof.*" The difference between these clauses in the two constitutions is very striking.

In the ante-bellum days, and even since the Civil War, one school of constructionists have held that the words to "provide for the common defense and general welfare" constituted a substantive grant of power and gave unlimited power to Congress as to objects for which money could be appropriated. The opposing Southern School denied such claim and confined the appropriations of Congress to the specific grants in Article 1, § 8. The latter view was strongly held by the seceding States and hence the omission of the words, "general welfare" from the above clause of the Constitution of the Confederate States so as to leave no ground for contention. Other instances might be enumerated, but these are sufficient to show that on the questions that had divided the country and for which the seceding States had stood, when they came to form their own Constitution, which was to control their actions, they incorporated into it such changes in the original Constitution of the United States as would grant and secure to them the rights for which they had been contending. It is, therefore, of interest to see how the power we are now discussing—the treaty-making power—was incorporated into the Constitution of the Confederate States. For while the conflict between the States and the federal government on the treaty-making power was never so pronounced, or so frequent, as under the other powers to which reference has been made, yet from the formation of the government down to the beginning of the Civil War this question was not without its real interest: and in the Constitutional Convention, as well as in the conventions of the States, and especially in that of Virginia, it was a source of sharp, if not

bitter contest between the State rights and the federal party of the country.

In the Virginia Convention the fiery eloquence of Patrick Henry had broadly asserted the subordination of the States to the treaty-making power. This was denied by Madison, Randolph, Nicholas, and others; but still the strife continued.

In 1796 the question arose under the Jay Treaty which carried an appropriation of money. It is well known that under the Constitution Congress alone can appropriate money. The House of Representatives, therefore, insisted that since the treaty could not be carried out without the appropriation of money to which their assent must be given that the treaty and papers therewith should be submitted to them. This proposition President Washington declined in a most fervid and earnest message, but the House by the vote of sixty-two to thirty-seven asserted its prerogative before appropriating the money to carry out the treaty.

Mr. Madison in a speech which was never answered defended the prerogative of the House.

The treaty of Ghent which provided for regulating duties between the United States and England was sent by President Madison to both Houses of Congress asking for proper legislation to carry it out. By this act he reaffirmed the position he had taken in the House of Representatives on the question involved in the Jay Treaty.

Many other incidents might be cited. These are given merely to show that the treaty-making power under the Constitution had provoked a contest between the State rights party and the Federalists very early in the history of the government which has continued down to the present time.

The statesmen who framed the Constitution of the Confederate States were quite familiar with these conflicts. The case of Ware *v.* Hilton,[2] besides others, in which the supremacy of a treaty over the law of a State was claimed were quite familiar to them. They were well aware of the claims asserted in the State conventions; of the action of the House of Repre-

[2] 3 Dallas (U. S.) 199.

sentatives from time to time in conflicts with the claim of the treaty power to over-ride their constitutional prerogative; yet, notwithstanding all of these facts were known to the men who wrote the Constitution of the Confederate States they incorporated into it the identical provision on this subject that is found in the Constitution of the United States and under which the claim of unlimited supremacy over all State laws is made by many.

Article 6, § 2, of the Constitution of the Confederate States, reads: "This Constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made or which shall be made under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This clause is identical with that of the Constitution of the United States, except the word Confederate is used instead of the word United States.

In this brief examination of the Constitution of the Confederate States we see the unmistakable intent on the part of its makers to eliminate every question which had been the cause of conflict between the sections from the beginning of the government. The treaty-making power was also one of these causes and here in the Confederate States Constitution it is left exactly as it is in the Constitution of the United States, and unlike the other provisions changed in the Confederate Constitution from the original, the treaty-making power was claimed to be unlimited in its supremacy over all laws and constitutions of the States. How can this be accounted for? Did the makers of the Confederate Constitution intend to correct certain matters that had been the cause of contention between the sections of the country that the right secured by these changes might be swallowed up in the unlimited supremacy of the treaty-making power as claimed? The conclusion is irresistible that this clause was left in the Constitution of the Confederate States because the statesmen who made it were perfectly satisfied that the claim of unlimited supremacy was untenable and unconstitutional and could never be asserted in the courts of the new Confederacy. It is impossible to believe that they could have made the other

changes in order to preserve their rights and yet left in the Confederate States Constitution the treaty-making power of the Constitution of the United States, which if the claim of unlimited supremacy can be maintained, would open the way for the extinction of most of the powers of the States.

Henry St. Geo. Tucker.

LEXINGTON, VIRGINIA.